No. 15-674

In the Supreme Court of the United States

United States of America et al.,

Petitioners,

v.

State of Texas et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL QUEER ASIAN PACIFIC ISLANDER ALLIANCE, INC., AND OTHERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The National Queer Asian Pacific Islander Alliance, Inc., is a federation of organizations serving lesbian, gay, bisexual, and transgender ("LGBT") individuals with Asian American, South Asian Southeast Asian, and Pacific Islander ("Asian and Pacific Islander") backgrounds. NQAPIA seeks to strengthen local LGBT groups for Asians and Pacific Islanders by building their organizational capacity, developing their leadership, promoting their visibility, educating their respective communities, enhancing recruitment of their members, and expanding their collaborations with other organizations. In addition, NQAPIA challenges homophobia and racism wherever it finds them. Many LGBT individuals of Asian and Pacific Islander descent are members of families with undocumented members.

API Chaya supports Asian, South Asian, and Pacific Islander survivors and families impacted by domestic violence and sexual assault, as well as human trafficking survivors from all communities. API Chaya engages communities to change societal conditions that enable domestic and sexual violence, human trafficking, and all forms of oppression, especially violence against women and the most vulnerable in our society.

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[1] As demonstrated by the consent letters accompanying it, all parties have consented to the filing of *amici*'s brief. *See* S. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *See id.* R. 37.6.

The Asian Pacific Islander Pride of Portland promotes the visibility and the just treatment of the LGBT Asian Pacific Islander community. It provides education and advocacy in the larger Asian and Pacific Islander, sexual-minority, and mainstream communities on issues affecting its constituency. It also creates and provides a welcoming, inclusive, and safe space wherein these individuals can find connection with others with common ground and background. Further, it provides social opportunities and other activities wherein these individuals can find mutual support. Finally, it educates its members about issues that affect its constituency and empowers the members to meaningfully, constructively, and successfully address the challenges of those issues.

The Bay Area Lawyers for Individual Freedom is a bar association of more than 600 LGBT members of the San Francisco Bay Area legal community. As the nation's oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public-policy debates concerning the rights of LGBT individuals. BALIF frequently appears as *amicus curiae* in cases, like this one, in which it can provide valuable perspective and argument on matters of broad public importance.

Familia: Trans Queer Liberation Movement is the only national organization that addresses, organizes, educates, and advocates for the issues most important to its LGBT and Latino communities. The organization is inclusive and serves all LGBT Latinos, Latinas, and gender-nonconforming

individuals. It also collaborates with non-LGBT families and friends who support its vision of a united LGBT Latino and Latina community.

The Gay Asian and Pacific Islander Men of New York ("GAPIMNY") was founded in 1990 and is an all-volunteer, membership-based community organization that provides a range of political, social, educational, and cultural programming. GAPIMNY works in coalition with other community organizations to help educate its communities on issues of race, sexuality, gender, and health. Its mission is to empower LGBT Asian and Pacific Islander people to create positive change.

The Gay Asian Pacific Alliance in San Francisco Bay Area is an organization dedicated to furthering the interests of LGBT Asian and Pacific Islanders by creating awareness, developing a positive collective identity, and establishing a supportive community.

hotpot! Philly is a Philadelphia-based group working to build community for LGBT Asian and Pacific Islanders through social gatherings, political action, and good food.

Immigration Equality is the only national organization focused entirely on representing LGBT and HIV-affected immigrants and their families. Immigration Equality coordinates a pro bono asylum project, provides technical assistance to attorneys, maintains an informational website, and fields questions from LGBT and HIV-affected individuals from around the world. Immigration Equality has provided trainings to asylum officers on asylum claims based on sexual orientation and gender identity, and co-authored the leading manual on

the subject. The organization currently has nearly 550 open LGBT–HIV asylum cases.

The Lesbian, Gay, Bisexual and Transgender Community Center in New York City fosters a welcoming environment where everyone is celebrated for who they are. The Center offers the LGBT communities of New York City health and wellness programs; arts, entertainment, and cultural events; and recovery, wellness, parenthood, and family support services.

The National Center for Transgender Equality, founded in 2003, is dedicated to improving the lives of transgender people and ending discrimination and violence through advocacy, education, and collaboration. NCTE works with Congress, federal agencies, and state and local advocates and stakeholders to advance public policies that will improve transgender people's lives in areas including employment, health care, housing, and education.

The National LGBTQ Task Force advances full freedom, justice, and equality for LGBT people.

PFLAG, Inc., is the nation's largest LGBT family and ally nonprofit organization, with more than 200,000 members and supporters and 400 affiliates, including seven chapters in Maryland. PFLAG's members are parents, children, grandparents, siblings, and friends of LGBT individuals. Founded in 1972, PFLAG is committed to advancing equality and full societal affirmation of LGBT people through its threefold mission of support, education, and advocacy.

The Queer Asian Pacific-Islander Alliance in Boston is committed to providing a supportive so-

cial, political, and educational environment for LGBT people of Asian and Pacific Islander heritage in the Boston and New England areas.

SALGA-NYC serves to promote awareness, acceptance, empowerment, and safe inclusive spaces for people of all sexual and gender identities, who trace their heritage to South Asia or who identify as South Asian. SALGA-NYC is a not-for-profit, all-volunteer organization, serving the South Asian LGBT community. Its mission is to enable community members to establish cultural visibility and take a stand against oppression and discrimination in all its forms.

Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders ("SAGE") is a national organization that offers supportive services and consumer resources to LGBT older adults and their caregivers, advocates for public-policy changes that address the needs of LGBT older people, and provides training for aging providers and LGBT organizations. In partnership with constituents and allies, SAGE works to achieve a high quality of life for LGBT older adults, supports and advocates for their rights, fosters a greater understanding of aging in all communities, and promotes positive images of LGBT life in later years.

Southerners on New Ground ("SONG") is a regional queer-liberation organization made up of people of color, immigrants, undocumented people, people with disabilities, working-class, rural, and small-town LGBT people in the South. SONG believes that its members are bound together by a shared desire for themselves, each other, and their communities to survive and thrive. SONG believes

that community organizing is the best way for the group to build collective power and transform the South. Out of this belief SONG is committed to building freedom movements rooted in southern traditions like community organizing, political education, storytelling, music, breaking bread, resistance, humor, performance, critical thinking, and celebration.

The Transgender Law Center changes law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

The mission of the Trevor Project is to end suicide among LGBT young people. The organization works to fulfill this mission through four strategies: (1) providing crisis counseling to LGBT young people thinking of suicide; (2) offering resources, supportive counseling, and a sense of community to LGBT young people to reduce the risk that they become suicidal; (3) educating young people and adults who interact with young people on LGBT-competent suicide prevention, risk detection, and response; and (4) advocating for laws and policies that will reduce suicide among LGBT young people.

UTOPIA Seattle's mission is to promote unity and strength among the Polynesian LGBT community; provide support and guidance to youths regarding sexual orientation and how it is viewed within the Polynesian culture; provide awareness to the LGBT, Polynesian, and greater community on issues regarding the prejudices and difficulties LGBT Polynesians face and to propose potential solutions; offer a referral service to Polynesians to help them address problems they face as recent

immigrants to the United States; and share culture with the greater community through traditional songs and dance.

VAYLA is a progressive multi-racial community-based organization in New Orleans that empowers youth and families through supportive services and organizing for cultural enrichment and positive social change.

Amici have long supported immigration rights and deferred-action programs like the ones enjoined in this case.

SUMMARY OF ARGUMENT

The Fifth Circuit affirmed a district court preliminary injunction, pending trial, forbidding expansion of the Deferred Action for Childhood Arrivals policy ("DACA") and implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA").[2] As the government explained in its petition, the Enjoined Programs represented the Executive Branch's attempt to balance the enforcement of federal immigration law, Congress's direction to focus on serious criminals and terrorists, and the reality that Congress had appropriated insufficient funds to eject all undocumented aliens from the United States. (Pet. 8–10.) In particular, the Enjoined Programs allowed undocumented parents of U.S. citizens and lawful permanent residents to seek—and the Executive Branch to grant on a case-by-case basis—deferred action on their immigration status. (*Id.*)

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[2] *Amici* refer in their brief to the expansion of DACA and the implementation of DAPA as "the Enjoined Programs."

The Fifth Circuit affirmed this decision based, in part, on a conclusion that "[t]he states have shown 'that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted.' The states have alleged a concrete threatened injury in the form of millions of dollars of losses." *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (Pet. App. 86a) (quoting *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009))). Similarly, the Fifth Circuit also held:

> The states have also sufficiently established that "an injunction will not disserve the public interest." *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). . . . The main difference is that, instead of relying on their financial interests, the states refer to the public interest in protecting separation of powers by curtailing unlawful executive action.
>
> . . . The interest the states have identified cannot be, given the difficulty of restoring the *status quo ante* if DAPA were to be implemented. The public interest easily favors an injunction.

Id. at 187 (Pet. App. 88a) (footnote omitted).

In rendering its decision, the Fifth Circuit overstated the alleged harm caused by the Enjoined Programs on certain states and minimized the actual harm that the injunction would inflict, and has inflicted, on undocumented LGBT individuals as

well as U.S. citizen/lawful permanent resident LGBT children with undocumented parents. In doing so, the court ignored the specific harms resulting from the injunction that adversely impact the population of undocumented persons in the United States and their families.

A recent study by the Migration Policy Institute places the number of undocumented adults with children eligible for DAPA at 3.6 million undocumented individuals caring for over 4.3 million U.S. citizen/lawful permanent resident children.[3] In the case of Asian and Pacific Islander LGBT individuals, these sub-populations are particularly vulnerable to the disruption to the family structure that the injunction creates.

The Enjoined Programs, at their core, strengthen family unity and support, both of which are essential to LGBT individuals in Asian and Pacific Islander communities. The injunction places at risk of deportation DACA-expansion-eligible individuals as well as DAPA-eligible parents, putting children, a population particularly dependent on social and familial support, at risk of significant injury due to lack of support by separating them from their parents. The United States recognizes in its Constitution the dignity of LGBT individuals and their families and provides them with fundamental protections and rights. Without the Enjoined Programs, DACA-expansion-eligible LGBT individuals are

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[3] Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children* 5 (Feb. 2016), *available at* http://www.migrationpolicy.org/sites/default/files/publications/DAPA-Profile-FINALWEB.pdf.

forced into situations where they may be forced to move to a country where they will be subject to harassment, violence, and potential legal prosecution. Similarly, families consisting of DAPA-eligible undocumented parents and U.S. citizen/lawful permanent resident LGBT children are being forced into an unenviable decision—choosing between leaving the safety of the United States and traveling with their children to a potentially dangerous legal and social environment, or leaving the United States without their children, who would remain alone in this country, stripped bare of critical family support, and in many cases unable to survive on their own.

ARGUMENT

I. The Enjoined Programs Strengthen Family Unity and Support, Both of Which Are Essential to U.S. Citizen/Lawful Permanent Resident LGBT Children in Asian and Pacific Islander Communities.

As this Court recognized in *Obergefell v. Hodges*:

> [M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

135 S. Ct. 2584, 2599 (2015) (citations omitted).

Childhood and adolescence are periods of profound physical, cognitive, and social development, and include the development of sexual identity. This development has been shown to directly affect a child's emotional and psychosocial well-being.[4] During this period of development children and adolescents find support from their parents, families, and caregivers.

For children, regardless of sexual orientation or ethnicity, the link between social support and health is well established.[5] Evidence suggests that parental support is a vital source of social support for young people, particularly within the LGBT community, where LGBT children face developmental challenges with a stigmatized identity.[6] Social stigma associated with homosexuality and deviation from gender roles remains prevalent, especially for young people.[7] Parental support for children is even stronger in the Asian and Pacific Is-

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[4] Jeana R. Bracey et al., *Examining Ethnic Identity and Self-Esteem Among Biracial and Monoracial Adolescents* 33 J. Youth & Adolescence 123, 124 (2004).

[5] Belinda L. Needham & Erika L. Austin, *Sexual Orientation, Parental Support, and Health During the Transition to Young Adulthood*, 39 J. Youth & Adolescence 1189, 1190 (2010).

[6] Yolanda Padilla et al., *Parental Acceptance and Illegal Drug Use Among Gay, Lesbian, and Bisexual Adolescents: Results from a National Survey*, 55 Social Work 265, 272 (2010).

[7] Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. Youth & Adolescence 1001, 1002 (2009).

lander community as the societal emphasis is on loyalty to the family first; the family unit is the primary center for support, including religious, economic, political, and social mores.[8]

The disruption of the strength of the family bond created by the injunction puts children, a population particularly vulnerable and dependent on social support, at risk of significant injury due to lack of familial support by placing undocumented parents of these U.S. citizens/lawful permanent residents at risk of deportation.[9]

A. U.S. LGBT Citizen/Lawful Permanent Resident Children Derive Significant Strength from Their Families.

Parents, families, foster parents, caregivers, and guardians have very dramatic impacts on the health and well-being of their LGBT children.[10] Research strongly supports the correlation between a family's connectedness and support of an LGBT child and that child's physical and mental health. For example, a recent study suggested that "sexual minorities" may have worse health-related out-

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[8] Hazel Rose Markus & Shinobu Kitayama, *Culture and Self: Implications for Cognition, Emotion, and Motivation*, 98 Psych. Rev. 224, 241 (1991).

[9] Even when families do not support their LGBT children and estrangement occurs, such children understandably hope for reconciliation with their families, and the Enjoined Programs increase the opportunity for such reconciliation.

[10] Caitlin Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual &Transgender Children* 4–7 (2009), *available at* http://familyproject.sfsu.edu/sites/sites7.sfsu.edu.familyproject/files/FAP_English%20Booklet_pst.pdf.

comes during adolescence because they report lower levels of "family connectedness," a key protective resource.[11] Researchers have also concluded that Asian American LGBT youth in the Midwestern United States who perceived lower levels of family caring and had negative perceptions of the climate in their schools reported lower self-esteem, resulting in greater emotional distress.[12]

Other studies suggest that the manner in which parents react to their LGBT children's sexual or gender identity can significantly affect their children's physical and mental health.[13] Scientific studies have established a clear link between specific parental and caregiver rejecting behaviors and negative health problems in lesbian, gay, and bisexual adults.[14] A family's attitudes, behaviors, and interactions have been shown to clearly apply to the LGBT adolescent's physical and emotional states.[15] Research proves that connections to family have been shown to prevent major health risk behaviors.

The Enjoined Programs strengthen family support, which is critical to the health and well-being of LGBT youth. Forcing LGBT youth into rejection-type situations, such as family division due to deportation or removal from the United States, will

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[11] Needham & Austin, *supra* note 5, at 1190.

[12] Yuko Homma & Elizabeth M. Saewyc, *The Emotional Well-Being of Asian-American Sexual Minority Youth In School*, J. LGBT Health Res., Jan. 2007, at 67, 73.

[13] Ryan, *supra* note 10, at 5–7.

[14] *Id.*

[15] *Id.*

deprive them of family connectedness that is essential for their healthy development and well-being.

B. Family Serves a Particularly Important Role in Asian and Pacific Islander Communities.

The risk of family separation that the Enjoined Programs manage—and the district court's injunction enhances—affects Asian and Pacific Islander LGBT children acutely, because in their communities the family is one's primary obligation and first loyalty, as well as the center for religious, economic, political, and social mores.

Asian and Pacific Islander families emphasize interdependence among family members, stressing self in relation to others within the family. The family is the central focus of Asian culture, so much so that some have asserted that the family is considered the prototype for all relationships.[16] Asian children are taught from an early age that family relationships and obligations are a primary obligation. Accordingly, these children mature with a deep sense of obligation and loyalty to the family unit, which is put first before all others.[17]

The Asian and Pacific Islander child–parent relationship is also shaped by this cultural emphasis on interdependence among family members.[18] Asian and Pacific Islander family obligation ex-

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[16] Markus & Kitayama, *supra* note 8, at 241.

[17] *Id.*

[18] Ruth K. Chao, *Chinese and European American Cultural Models of the Self-Reflected in Mothers' Childrearing Beliefs*, 23 Ethos 328, 331–32 (1995).

tends to all family members' care obligations: children care for aging adults; adults care for children and younger siblings.

This increased reliance and dependence on family relationships makes it even more critical in Asian and Pacific Islander families with LGBT children that parents be present to foster acceptance, an attribute proven to lead to healthy young adulthood. This is demonstrated in the fact that more than one in four Asian and Pacific Islander same-sex couples raise children, a rate which is projected to continue to grow based on these social and cultural norms.[19]

This cultural emphasis on family interdependence makes even more acute the negative effects of the lower court's injunction on the child–parent relationship for Asian-Pacific Islander families with U.S. citizen/lawful permanent resident children.

C. The Enjoined Programs Directly Impact U.S. LGBT Citizen/Lawful Permanent Resident Children in Asian and Pacific Islander Communities.

There are an estimated 267,000 undocumented LGBT immigrants in the United States, of which a disproportionate share are from Asian and Pacific

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[19] Angeliki Kastanis & Gary J. Gates, *LGBT Asian and Pacific Islander Individuals and Same-sex Couples* 1, 2 (n.d.), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-2010-API-Final.pdf (using 2010 census data); Glenn D. Magpantay, *The Future of the LGBTQ Asian American and Pacific Islander Community in 2040*, AAPI Nexus: Asian Am. & Pac. Islanders, Policy, Practice & Community (forthcoming 2016) (manuscript at 6–8) (on file with NQAPIA).

Islander communities.[20] The manner in which the Enjoined Programs preserve family relationships and protect some of the most vulnerable members of our population is best illustrated by several examples of Asian and Pacific Islander LGBT individuals who could substantially and materially benefit from the Enjoined Programs.

1. Example 1: Asian Family with an LGBT Citizen Child and an Undocumented Parent.

Sandra Meetran, a sixteen-year-old student, currently resides in Rhode Island. Sandra and her sister are natural-born U.S. citizens. Sandra's family is from Laos, and Sandra's father and mother were undocumented in the United States, having overstayed their visitor visas. Sandra's father was deported to Laos when she was in middle school, at a time when she was realizing that she was gay. According to Sandra:

> When I was first starting to question my sexuality, my dad was suddenly taken away from my family and me. He got sent away and was placed in ICE holding for four to five months. . . . My dad was taken from me when I was really young. I didn't know what to do about it. It was devastating to me because it meant my dad wasn't going to watch me grow up. He missed

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[20] Gary J. Gates, *LGBT Adult Immigrants in the United States* 1 (Mar. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf.

> my middle school graduation, he's going to miss me driving for the first time, and he's going to miss me graduating from high school and maybe even college. He's missing all the things a father needs to see.[21]

After Sandra's father was deported, the disruption to the family structure resulted in additional pressures being shifted to Sandra and her mother, who remains at risk of potential deportation as well. In Sandra's own words,

> My dad has spent the last couple years in Laos. He has no job, and his only income is money my mom sends him, maybe a few hundred dollars. My mom becomes depressed and suffers from bad heart problems. She is overworked and very stressed because of all the responsibilities she had to take on after my dad was deported. Ever since this happened our family has fallen into poverty.

Id.

Sandra's parents, as undocumented parents of an Asian LGBT child who is a citizen of the United States, may have been eligible to benefit from the Enjoined Programs' familial protections. Sandra's father and mother could have had the opportunity to remain in the United States under the DAPA program, and provide the financial and psychologi-

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[21] NQAPIA, *Uncovering Our Stories: Sandy* (July 23, 2013), http://www.nqapia.org/wpp/uncovering-our-stories-sandy/.

cal support necessary for success for any child who identifies herself as part of the LGBT community. Instead, Sandra's story serves as an example of how the Enjoined Programs directly and uniquely benefit some of the most vulnerable portions of the population, and of the direct negative consequences of the injunction, factors ignored in the Fifth Circuit's decision.

2. Example 2: Undocumented Pacific Islander LGBT Immigrant over the Age of Thirty Who Arrived in the United States as a Child.

Jose Antonio Vargas is a thirty-four-year old Pulitzer-prize winning journalist, filmmaker, and media producer who resides in Los Angeles, California. He is the founder of Define American, a nonprofit media and culture organization that seeks to elevate the conversation around immigration and citizenship in America; and the founder and editor of #EmergingUS, a digital platform that lives at the intersection of race, immigration, and identity in a multicultural America. Jose has received numerous additional accolades for his work, including the Public Service Award from the National Council of La Raza, the country's largest Latino advocacy organization; the Salem Award from the Salem Award Foundation, which draws upon the lessons of the Salem Witch Trials of 1692; the Freedom to Write Award from PEN Center USA; and an honorary Doctor of Letters from Colby College.[22]

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[22] Jose Antonio Vargas, *Bio* (n.d.), http://joseantoniovargas.com/bio.

Jose is also an undocumented LGBT individual. Jose first arrived in the U.S. in 1993 at the age of twelve from the Philippines, sent by his mother to live with his grandparents in California. It was not until four years later when Jose applied for a driver's license at the age of sixteen that he realized that he was undocumented—his grandparents had purchased a set of documents to facilitate his arrival in the United States.

Based on his age, Jose was ineligible for the initial DACA program, missing the deadline by four months. Jose is, however, eligible for participation in expansion of DACA, which would give him the chance to visit his mother in the Philippines for the first time in over two decades and permit him to continue his successful career in the United States. In contrast, the district court's injunction puts Jose at continued risk of physical violence, bigotry, and pervasive discrimination in social life and the work place against LGBT individuals if deported to the Philippines, or if he were to leave the country to visit his mother.

Jose's story is one example of the many LGBT adults over the age of thirty eligible for the DACA expansion who despite significant cultural and economic contributions to the United States, continue to be at risk of deportation and personal risk based on the district court's injunction.

3. Example 3: Asian LGBT Immigrant Participant in DACA.

Tony Choi is a twenty-four-year old gay South Korean undocumented beneficiary of the DACA program who lives in Little Ferry, New Jersey. Tony originally arrived in the United States at the

age of eight with his family "in the aftermath of the Asian financial crisis that had wiped away our hopes and dreams. So we moved to the United States to start anew."[23] He graduated college in 2011, with a major in Spanish and political science and is active with the immigrant community.

Tony's own words best capture how DACA personally benefitted him as an undocumented gay Asian-American:

> In 2010, after the failure of the DREAM Act in a Democratic controlled Senate and my mother's cancer diagnosis, I had lost hope. The choices ahead of me were to live a closeted life taking care of my mother or to return to Korea where my LGBT identity would subject me to harsh hazing for two years in the mandatory military service.
>
> Instead, I chose a third option to speak out and advocate for my community when everyone was saying that the legislative pathway to citizenship was dead. As a result of collaborative actions taken by other undocumented youth like me, President Obama announced Deferred Action for Childhood Arrivals, DACA. Since then, I have helped dozens of other undocumented youth find reprieve through DACA and continued working

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[23] Tony Choi, Remarks at NQAPIA Press Conference at U.S. Court of Appeals for the Second Circuit (Apr. 15, 2012).

> to halt deportations. I've also just Because of this measure, I was able to file taxes for this year as well.[24]

Tony's story illustrates how the DACA program protects Asian and Pacific Islander LGBT individuals from potential harassment and discrimination in their home countries and, in turn, how the Enjoined Programs could provide the same benefits to an even greater population of vulnerable individuals and their families.

II. Without the Enjoined Programs, Families with Undocumented Parents and LGBT Children Who Are U.S. Citizens/Lawful Permanent Residents Face a No-Win Decision.

The injunction in this case—which nullifies the protections of the announced Enjoined Programs—places U.S. citizen/lawful permanent resident LGBT children with undocumented parents in extremely difficult circumstances. It presents parents with an impossible decision: leave the United States with their children and go to the potentially dangerous legal and social environment of their home countries, or leave the United States with their children remaining alone here, thus putting their children at risk due to lack of family support.

In cases of LGBT individuals, particularly those from Asian and Pacific Islander countries, forcing families to choose between keeping the family together by returning to their home countries or leaving the LGBT child here on his or her own without parental support places the LGBT child at signifi-

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[24] *Id.*

cant personal and legal risk due to the legal and social environment. The system of legal protections and social services available to LGBT individuals in the United States is vastly superior to those of many of the anti-LGBT home countries to which Asian and Pacific Islander families will be forced to return. Indeed, for many LGBT young people, doing so is tantamount to a death sentence.

A. The United States Contains a Significant Network of Social Services for LGBT Individuals and This Nation's Legal Regime Protects Significant LGBT Rights.

Through its history, the United States has proudly held itself to be a place of freedom and opportunity for immigrants from around the world, for the "huddled masses, yearning to be free."[25] This promise has had particular truth for immigrants from certain minority groups seeking to flee persecution and violence in their native countries. The Constitution's protections of the free exercise of religion, expression, and speech, and the due-process and equal-protection guarantees afforded to racial and ethnic minorities have allowed countless religious and ethnic minorities to find safe harbor in the United States since our nation's founding. Today, the United States is a nation that also recognizes the dignity of LGBT immigrants and their families under federal law and the Constitution, allowing them to pursue the full promise of the

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[25] *See* Emma Lazarus, *The New Colossus* (1883), *reprinted in Emma Lazarus: Selected Poems and Other Writings* 233, 233 (Gregory Eiselein ed., 2002).

American dream that so many seek when they immigrate to our country.[26]

The Constitution has been held to guarantee LGBT families the right to the same legal recognition afforded to heterosexual marriages by the United States government and the states.[27] In recognizing that same-sex marriage is protected by the Fifth and Fourteenth Amendments of the U.S. Constitution, this Court found that marriage is central to the human condition, "[r]ising from the most basic human needs," and "essential to our most profound hopes and aspirations."[28] Having long held that the right to marry is a fundamental constitutional right, the Court found that choices about marriage and family "shape an individual's destiny," by allowing a married couple, regardless of sexual orientation, to pursue other core freedoms such as expression, intimacy, and spirituality.[29] The Court also found that guaranteeing the right for LGBT couples to marry "safeguards children and families," by affording recognition and legal structure to the familial relationship.[30] Marriage equality, simply put, brings permanency and stability to LGBT families, which the Court found erases the stigma that children suffer when their families are not fully recognized under the law.[31]

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[26] *See Obergefell*, 135 S. Ct. at 2599.

[27] *Id.*

[28] *Id.* at 2594.

[29] *See Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell*, 135 S. Ct. at 2599.

[30] *Obergefell*, 135 S. Ct. at 2600.

[31] *Id.*

LGBT families in the United States are also afforded a significant number of federal benefits, rights, and protections, in accordance with the Constitution's recognition of the equality and dignity afforded LGBT individuals under the law of this country. In *United States v. Windsor*, the Court recognized a guiding principle that the Constitution mandates recognition of the dignity of LGBT people under our laws.[32] There are 1,138 benefits, rights, and protections provided on the basis of marital status under federal law in the United States.[33] In accordance with the *Windsor* decision, the federal government has since made available a number of additional significant benefits to LGBT couples and families.

Following the decision, the Executive Branch directed federal agencies to make the promise of *Windsor* a reality, and began working to identify "every federal law, rule, policy, and practice in which marital status is a relevant consideration."[34] Following the President's directive to the federal government, the Department of Homeland Security "directed U.S. Citizenship and Immigration Ser-

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[32] 133 S. Ct. 2675, 2696 (2013) (finding DOMA was "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

[33] *See* Human Rights Campaign, *Overview of Federal Benefits Granted to Married Couples* (n.d.), http://www.hrc.org/resources/an-overview-of-federal-rights-and-protections-granted-to-married-couples.

[34] Memorandum from the Attorney General to the President Regarding Implementation of *United States v. Windsor* 1 (June 20, 2014), *available at* https://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf.

vices (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse."[35] Similarly, DHS guidance recognized same-sex spouses for refugee status and asylum.[36] In addition, the Social Security Administration now processes retirement benefit claims based on same-sex marriages, in accordance with *Windsor*.[37] The federal government now treats LGBT families equally with regard to Supplemental Nutrition Assistance Program eligibility, recognizes LGBT families for federal student financial aid programs, recognizes LGBT families for Medicaid and Children's Health Insurance Program eligibility, grants LGBT families equal access to Affordable Care Act exchanges, and recognizes same-sex spouses under the Family and Medical Leave Act.[38] LGBT veterans' spouses and surviving spouses now have equal access to veterans' benefits, and lesbian and gay service members can serve openly in America's armed forces following the repeal of "Don't Ask, Don't Tell."[39]

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[35] *See* U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., *Implementation of the Supreme Court Ruling on the Defense of Marriage Act* (July 1, 2013), https://www.uscis.gov/news/implementation-supreme-court-ruling-defense-marriage-act.

[36] *See* Memorandum from the Attorney General to the President, *supra* note 34, attach. at 4–5.

[37] *See id.* attach. at 13.

[38] *Id.* attach. at 1–3, 6, 12.

[39] *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515, 3515–16 (implementing repeal of 10 U.S.C. § 654).

While LGBT individuals are not uniformly protected by a federal nondiscrimination law, Congress passed hate-crime legislation in 2009 to protect LGBT individuals by expanding existing law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.[40] The federal government has also implemented nondiscrimination policies for federal workers and contractors.[41] In July 2014, the President amended earlier executive orders regarding equal-employment opportunity in the federal government and in federal contracting by adding sexual orientation and gender identity to the lists of protected categories.[42] Further, LGBT victims of domestic violence in the United States now receive federal protections and substantial support under programs authorized by the Violence Against Women Act.[43]

In addition to federal protections and benefits, many state and local jurisdictions afford protec-

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[40] *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4707(a), 123 Stat. 2190, 2838–41 (2009) (codified at 18 U.S.C. § 249). Sections 4701 through 4713 of the law are the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. *Id.* § 4701, 123 Stat. at 2835.

[41] *See* Exec. Order No. 13,672, §§ 1–2, 3 C.F.R. 282, 282–83 (2015), *reprinted in* 42 U.S.C. § 2000e app. at 998 (Supp. II 2014).

[42] *See id.*

[43] *See* Violence Against Women Act of 1994, § 40002(a)(39), (b)(13)(A), 42 U.S.C. § 13925(a)(39), (b)(13)(A) (Supp. II 2014); Omnibus Crime Control and Safe Streets Act of 1968, § 2001(b)(19), 42 U.S.C. § 3796gg(b)(19) (Supp. II 2014); Higher Education Act of 1965, § 485(f), 20 U.S.C. § 1092(f) (2012 & Supp. II 2014).

tions and benefits to LGBT people and their families. While some states with significant populations of undocumented immigrants, such as Texas and Arizona, do not afford protections from discrimination on the basis of sexual orientation, many states with significant populations of individuals eligible for DAPA or DACA[44] have robust nondiscrimination protections for people on the basis of sexual orientation, gender identity, or both.[45]

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[44] The Migration Policy Institute estimates that approximately 3.6 million individuals are potentially eligible for the deferred action under the DAPA program. *See* Migration Policy Inst., *National and State Estimates of Populations Eligible for DAPA and DACA Programs, 2009–2013* (n.d.), *available at* http://www.migrationpolicy.org/sites/default/files/datahub/DACA-DAPA-2013State%20Estimates-Spreadsheet-FINAL.xlsx. The Migration Policy Institute estimates that approximately 1.1 million of those individuals reside in California; 230,000 in New York; 183,000 in Illinois; 133,000 in New Jersey; 56,000 in Maryland; 74,000 in Washington; and 62,000 in Colorado. *Id.* The Migration Policy Institute further estimates that approximately 559,000 individuals eligible for DAPA live in Texas and 97,000 live in Arizona. *Id.*

[45] *See* Cal. Gov't Code §§ 12920, 12921, 12940, 12944, 12949 (West Supp. 2016) (protecting sexual orientation and gender identity); N.Y. Exec. Law § 296 (McKinney Supp. 2016) (protecting sexual orientation), *amended by* Act of Oct. 21, 2015, ch. 365, §§ 1–4 (Westlaw), *and* Act of Oct. 21, 2015, ch. 369, § 2 (Westlaw); 775 Ill. Comp. Stat. 5/1-102 (2014) (protecting sexual orientation and gender identity); N.J. Stat. Ann. § 10:5-4 (West 2013) (protecting sexual orientation and gender identity); Md. Code Ann., State Gov't §§ 20-602, -606 (LexisNexis repl. vol. 2014) (protecting sexual orientation and gender identity); Wash. Rev. Code § 49.60.030 (2014); Exec. Order No. 12-02 (Wash. June 20, 2012), *available at* http://www.governor.wa.gov/sites/default/files/exe_order/eo_12-02.pdf (protecting sexual orientation and gender identity); Mass. Gen. Laws ch. 151B, § 3 (2015) (protecting

B. The Cultural Homelands of the Asian and Pacific Islander Communities Do Not Protect LGBT Rights.

The climate for LGBT individuals remains largely dangerous throughout the world outside the United States. Worldwide there are seventy-five countries where same-sex sexual acts are illegal.[46] Homosexual activity remains punishable by the death penalty in seven countries: Iran, Mauritania, the northern provinces of Nigeria, the southern regions of Somalia, Saudi Arabia, Sudan, and Yemen.[47] Pakistan, Afghanistan, and Qatar also have death-penalty statutes for same-sex conduct, but these statutes are not generally used.[48] In Yemen, sex between women is punishable by up to three years in prison and one hundred lashes; sex between men is punishable by whipping, imprisonment, and death by stoning.[49]

Furthermore, the Asia–Pacific region of the world is of particular concern as the legal and soci-

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sexual orientation and gender identity); Colo. Rev. Stat. § 24-34-402 (2015) (protecting sexual orientation and gender identity).

[46] In ten years criminalizing countries dropped from ninety-two to seventy-five. Aengus Carroll & Lucas Paoli Itaborahy, *State-Sponsored Homophobia* 8 (10th ed. May 2015), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf.

[47] *Id.* at 29.

[48] *Id.*

[49] Human Rights Watch, *World Report 2016: Events of 2015*, at 652 (2016), *available at* https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf.

etal norms are overwhelmingly anti-LGBT in many of these countries, including, but not limited to:

- Malaysia, where whipping is condoned for homosexual acts.[50]
- China, where its LGBT population experiences violence and discrimination in society as well as within their own familial structure.[51] Bullying of LGBT youth in schools is also common in China; a survey conducted in 2012 revealed that 77 percent of respondents had encountered bullying based on sexual orientation or gender identity.[52]
- South Korea, where pervasive societal discrimination coupled with the absence of any comprehensive antidiscrimination law make many in the LGBT community conceal their sexuality.[53]

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[50] Dominique Mosbergen, *Being LGBT in Southeast Asia: Stories of Abuse, Survival and Tremendous Courage*, Huffington Post (Oct. 11, 2015), http://www.huffingtonpost.com/entry/lgbt-in-southeast-asia_us_55e406e1e4b0c818f6185151.

[51] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: China Country Report* 23, 27–28 (2014), *available at* http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-china-country-report.pdf.

[52] Aibai Culture & Educ. Ctr., *Report of the Online Survey on Homophobic and Trans-phobic Bully at Educational Institutions* 4–5 (Nov. 8, 2012), *available at* http://www.aibai.com/ebook/library/ebook_aibai/download/2012/11/8/Report%20of%20the%20Online%20Survey%20on%20Homophobia%20and%20Trans-phobia%20Bully(1).pdf.

[53] Immigration and Refugee Board of Canada, *Korea, Republic of: Treatment of Homosexuals, Including Legislation,*

- Nepal, which lacks laws against discrimination and LGBT individuals report facing discrimination and abuse in employment. Despite recent recognition of a "third gender" for people who do not identify as male or female, Nepal lacks legislation to protect LGBT individuals from violence, harassment, or discrimination based on their gender identity. LGBT individuals report being widely harassed.[54]
- Vietnam, where LGBT individuals experience discrimination, physical and psychological assaults and societal abandonment. Employment opportunities remain limited; the discriminatory environment is a leading cause of poverty for LGBT individuals. LGBT individuals also report denial of education and harassment in school.[55]

Even where Asian and Pacific Islander countries offer some legal protections to LGBT individuals, such protections are often de facto ignored by society, the authorities, or both:

Availability of State Protection and Support Services (Nov. 30, 2009), http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=452660.

[54] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT* in *Asia: Nepal Country Report* 33, 39 (2014), *available at* https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Nepal_Country_Report.pdf.

[55] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: Viet Nam Country Report* 25–27, 36–37 (2014), *available at* https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Viet_Nam_report_ENG.pdf.

- Thailand for example, though thought of as friendly to LGBT individuals, remains a country where LGBT individuals are widely discriminated against. Employment opportunities and social rights remain limited by discrimination. Violence against LGBT individuals remains quite common.[56]
- Similarly, though Mongolia was the first country in Asia to integrate LGBT issues into a sexual-education curriculum, it remains a society where LGBT individuals face strong bias and discrimination. The LGBT community remains largely in the closet fearful of stigma, discrimination and violent acts, and criminal acts including severe violence; and abuse from law enforcement personnel is widely reported by Mongolia's LGBT community.[57]
- Daily LGBT life in the Philippines is fraught with danger of physical violence, bigotry, and pervasive discrimination in social life and the work place. In fact, the Philippines experienced the highest rates of murders of transgender people in all of Asia from 2008

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[56] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: Thailand Country Report* 20–29, 33–35, 43 (2014), *available at* https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Thailand_Country_Report.pdf.

[57] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: Mongolia Country Report* 19–24, 25–27 (2014), *available at* http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-mongolia-country-report.pdf.

to 2014. In 2008 there were twenty-nine murders of transgender people. In 2011, twenty-eight were killed because of their sexual identities.[58]

- LGBT Cambodians report harassment and discrimination in the workplace as well as limitations in occupational choice. Physical attacks and abuse are wildly reported even in public settings.[59]

These examples starkly contrast with the strength of the legal protections and benefits provided to LGBT individuals within the United States. Undocumented LGBT individuals as well as LGBT children with undocumented parents of adults are placed at significant risk of discrimination, harassment, and legal prosecution if the lower court's injunction is affirmed.

C. The Injunction in This Case Creates a No-Win Choice for LGBT Individuals in Families with Undocumented Members and Undocumented LGBT Individuals.

The Enjoined Programs allow undocumented LGBT individuals and LGBT individuals with undocumented family members to stay with their

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[58] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: the Philippines Country Report* 8, 18–20 (2014), *available at* https://www.usaid.gov/sites/default/files/documents/1861/2014%20UNDP-USAID%20Philippines%20LGBT%20Country%20Report%20-%20FINAL.pdf.

[59] U.S. Agency for Int'l Dev. & U.N. Dev. Programme, *Being LGBT in Asia: Cambodia Country Report* 8–9, 42–44 (2014), *available at* http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2014-blia-cambodia-country-report.pdf.

families *and* continue to benefit from the services available to them in the United States consistent with the growing respect for "dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Obergefell*, 135 S. Ct. at 2599. The Enjoined Programs are consistent with the Executive Branch's longstanding respect for LGBT individuals under immigration law, and the district court's injunction has the perverse effect of diverting LGBT individuals from the United States—where they could seek asylum—to nations less likely to protect their LGBT rights.

Since the 1990s, the Executive Branch has recognized the ability of LGBT individuals to seek asylum in the United States because of their sexual orientation or gender identification. To establish asylum, immigrants must demonstrate that they are "refugees" fleeing a county "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012). In 1990, the Board of Immigration Appeals held that being homosexual made a Cuban man a member of a "particular social group." *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990). *Toboso-Alfonso* was no one-off decision: the Attorney General subsequently designated it "precedent in all proceedings involving the same issue or issues." *Id.* at 819 n.1 (internal quotation marks omitted). LGBT asylum applications still have to demonstrate the persecution elements of their claims to prevail, but *Toboso-*

Alfonso renders the particular-social-group issue moot in their cases.

The Executive Branch's post-*Toboso-Alfonso* treatment of LGBT individuals in asylum cases contrasted sharply with other areas of federal law that—at the time—took a less favorable view of LGBT rights. For example, when the BIA decided *Toboso-Alfonso*, this Court had recently held that laws criminalizing homosexual activity did not violate the Constitution, *Bowers v. Hardwick*, 478 U.S. 186, 190–96 (1986), and Congress would soon define marriage to exclude same-sex marriage, Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419–20 (1996) (codified at 1 U.S.C. § 7).[60] *Bowers* represents the nadir of this Court's treatment of LGBT rights, but the reversing trend following *Bowers* has been positive. The Court has since recognized the dignity of LGBT individuals in many cases, including overruling *Bowers* in *Lawrence v. Texas*, 539 U.S. 558, 564–78 (2003), and holding section 3 of DOMA unconstitutional in *Windsor*, 133 S. Ct. at 2693–96. (*See supra* Part II.A.) The Judicial Branch has consistently de-

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[60] *See also* Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. Davis L. Rev. 373, 375–76 (2011) ("This [*Toboso-Alfonso*'s] recognition of anti-gay persecution as a valid basis for asylum stood in stark contrast to contemporary constitutional jurisprudence on the rights of [LGBT] people."); Keith Southam, Note, *Who Am I and Who Do You Want Me To Be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 Chi.-Kent L. Rev. 1363, 1363–64 (2011) ("U.S. administrative and judicial remedies increasingly grant protection to LGBT individuals who flee from persecution in their home countries by permitting them to remain in the United States.").

ferred to and reinforced the Executive Branch's LGBT asylum policy.[61]

Under the regime that has existed since the 1990s, thousands of LGBT individuals have sought and received asylum in the United States.[62] Simi-

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[61] *See, e.g.*, *Kadri v. Mukasey*, 543 F.3d 16, 21–22 (1st Cir. 2008) (remanding case for assessment of whether Indonesian man suffered persecution because of his sexual orientation); *Morett v. Gonzales*, 190 F App'x 47, 48–49 (2d Cir. 2006) (remanding case of Venezuelan man and finding he had a well-founded fear of persecution on account of his sexual orientation); *Maldonado v. Attorney Gen. of the U.S.*, 188 F App'x 101, 103–05 (3d Cir. 2006) (remanding case of Argentinian man and finding he presumed to have a well-founded fear of persecution because of his sexual orientation); *Moab v. Gonzales*, 500 F.3d 656, 659–71 (7th Cir. 2007) (remanding case of Liberian man because sufficient evidence did not support the BIA's decision); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1117–19 (8th Cir. 2007) (remanding case of Ugandan woman because the immigration judge erred in evaluating her evidence of past persecution because of her sexual orientation); *Vitug v. Holder*, 723 F.3d 1056, 1064–66 (9th Cir. 2013) (remanding case of Filipino man because he demonstrated past persecution and BIA erred in denying him withholding of removal); *Razkane v. Holder*, 562 F.3d 1283, 1287–89 (10th Cir. 2009) (remanding case of Moroccan man because underlying proceedings included gay stereotyping by the immigration judge); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 948–51 (11th Cir. 2010) (remanding case of Venezuelan man because BIA's findings regarding past persecution were not supported by substantial evidence); *cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (explaining that rapes and assault of Mexican woman singled out because of her transgender identity constitute torture).

[62] *See* Elizabeth M. Glazer, *Sexual Reorientation*, 100 Geo. L.J. 997, 1038 (2012) (citing 2005 estimation that thousands of immigrants have received asylum since 1994 because of their sexual orientation).

larly, the Enjoined Programs fulfill many of the same policy goals and objectives as the asylum process. Nevertheless, while the Enjoined Programs provide similar benefits to undocumented persons, asylum is not an alternative to the benefits provided under the Enjoined Programs.

Asylum applications must be filed within one year of arriving in the United States. 8 C.F.R. § 208.4(a) (2015). The Enjoined Programs, by their terms, require an undocumented individual to have lived in the United States continuously since January 1, 2010, disqualifying eligible undocumented persons from applying for asylum in the United States without first leaving the country. Furthermore, asylum cases involve complex immigration proceedings, often require a substantial time to reach a decision, and do not provide applicants the immediate ability to obtain a work authorization in the United States, putting a substantial burden on applicants to support themselves while in the application process for asylum. In contrast, the Enjoined Programs are available to undocumented individuals without having to leave the United States and grant eligible individuals a streamlined application process whereby qualified persons can obtain a work authorization utilizing a more cost-efficient and timely process, saving scarce federal resources in this area.

The deferred-action programs at issue in this case similarly allow LGBT individuals—some of whom are citizens—to enjoy the benefits of this nation without sacrificing the critical support they receive from their family. The lower court's injunction, however, places undocumented LGBT individuals and LGBT individuals with undocumented

family members in the unenviable position of choosing the United States or their families. If they choose the latter, they may also be settling for nations where LGBT rights are not protected and their LGBT status places them in grave danger.[63]

In evaluating the balance of the harms related to injunctive relief in this case, the Fifth Circuit overstated the alleged harm caused by the deferred-action programs on certain states and undervalued the actual harm that the injunction would inflict, and has inflicted, on undocumented LGBT individuals and LGBT individuals with undocumented family members.

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[63] Arwen Swink, Note, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 Hastings Int'l & Comp. L. Rev. 251, 251–52 (2006) (noting that many countries criminalize homosexual activity, some countries prosecute LGBT individuals under vague morality laws, and that enforcement against LGBT individuals can take brutal forms); (*see also supra* Part II.B).

CONCLUSION

For the foregoing reasons and those in the briefs of Petitioners and the other *amici curiae* supporting them, the National Queer Asian Pacific Islander Alliance, Inc., and the other *amici curiae* on this brief urge the Court to reverse the judgment of the Fifth Circuit and allow the government to implement the enjoined deferred-action programs.

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Respectfully submitted,

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